United Nations Convention on the Law of the Sea

A Commentary

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ports situated far inland it may have to be supplemented by a functional approach, including fairways for seagoing vessels.[23]

Art. 8 (2) seems to assume that newly formed internal waters are clearly enclosed by the coastline and straight baselines. That might not always be the case if the straight baselines are drawn from the territorial sea of one State to that of another,[24] leading to a situation where the internal waters of two States are directly adjacent. REISMAN/WESTERMAN argue that the first and last basepoint of a system need to be located on the low-water line.[25] The UN Baseline Study more explicitly states that internal waters need to be enclosed by a system of straight baselines.[26] The Convention does not contain any specific rules on the delimitation of internal waters. The necessity might arise in particular when States share a system of straight baselines. The application of Art. 15 to these areas would seem in line with the interests of the States concerned, particularly when taking into consideration that the areas in question were likely territorial sea at some point in time.[27] 11

2. 'form part of the internal waters'

Art. 8 does not regulate the status of internal waters. It does, however, provide that if the application of the provisions of Art. 7 result in the generation of 'new' internal waters, these will be subject to the right of innocent passage. Conceptually, the status of internal waters is outside the scope of Part II; the status of internal waters must thus be inferred from other provisions of the UNCLOS or customary international law. 12

3. 'Except as provided in Part IV'

In its archipelagic waters, the archipelagic State may only draw closing lines in accordance with Arts. 9, 10 and 11 (Art. 50). It may not apply Art. 7 in its archipelagic waters.[28] Accordingly, there should be no situation in archipelagic waters where Art. 8 (2) applies; internal waters subject to the right on innocent passage should not exist in archipelagic waters. 13

4. Status of Internal Waters

The coastal State has full sovereignty over its internal waters,[29] as stated by Art. 2: 14

> 'The sovereignty of a coastal State extends, beyond its land territory and *internal waters* and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.'[30]

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of the Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources, 17 May 1980, ILM 19 (1980), 869.

[23] *Graf Vitzthum* (note 20), 84 (MN 35).

[24] See *Trümpler* on Art. 7 MN 42.

[25] *W. Michael Reisman/Gayl S. Westerman*, Straight Baselines in International Maritime Boundary Delimitation (1992), 91.

[26] UN DOALOS, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Seas (1989), 24 (para. 51), while it seems to recognize in a footnote (note 11) the practice of baselines drawn from the basepoint of one State to the basepoint of another, citing Netherlands, Germany, Finland, Norway and Sweden as examples.

[27] *Kai Trümpler*, Grenzen und Abgrenzungen des Küstenmeeres (2007), 138.

[28] Nordquist/Nandan/Rosenne (note 17), 445 (MN 50.6(a)). On the possibility to apply Arts. 6 and 13, see *Graf Vitzhum* (note 20), 83 (MN 32); *Trümpler* (note 27), 172 *et seq.*; see also *Symmons* on Art. 50 MN 5.

[29] *Graf Vitzhum* (note 20), 87 (MN 42); *Churchill/Lowe* (note 21), 61; see also ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States), Merits, Judgment of 27 June 1986, ICJ Reports (1986), 14, 111 (para. 212): 'The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory'.

[30] Emphasis added.

The language indicates that there is no difference in the sovereignty over land and internal waters; only in the realm beyond is the sovereignty subjected to the UNCLOS (see Art. 2 (3)). This underlines that the sovereignty over the territorial sea is in its nature and spatial extent derived from the coast – it is derivative in nature – while the sovereignty over the internal water is original. The sovereignty that the coastal State exercises over its territorial sea is justified by the possession of land that is situated next to the sea, i. e. the coastline; the sovereignty exercised over the internal waters is justified by the possession of the internal waters themselves.[31]

15 States thus have the right to regulate and enforce within their internal waters as on their land territory. In particular, they are free to regulate the exploration and exploitation of all living and non-living resources, archaeological research[32] and marine scientific research.

16 However, internal waters are situated between the State's territorial sea and its *terra firma*; notably all sea ports form part of the State's internal waters, so they are frequently entered by ships. These ships are then subject to the coastal State's territorial sovereignty, as well as to the flag State's jurisdiction, possibly leading to conflict.

17 a) Access to Internal Waters. As stated above, the coastal State enjoys full sovereignty over its internal waters. Regarding internal waters other than open commercial ports, such as internal waters along the coast, closed ports and bays, it seems clear that the State may regulate at its discretion.[33] With regard to ports in general, the International Court of Justice (ICJ) stated: 'It is also by virtue of its sovereignty that the coastal State may regulate access to its ports.'[34] The majority of writers seem to be in agreement with this conclusion.[35] A notable exception in earlier jurisprudence is the 1958 *ARAMCO Award*, which presumes a right of entry to ports under international law.[36] A considerable number of writers disagree with this finding, and it does not seem to have had a decisive influence on later decisions,[37] such as that of the ICJ quoted above.

18 Lagoni distinguishes three distinct situations in the question of port access: The closure of all or some ports of the State to international traffic, measures against vessels from certain flag States, and measures against individual vessels. Regarding the first situation, there seems to be strong support for the concept that States may decide which, if any, of their ports are open for foreign vessels, though such regulations are the exception in modern times.[38]

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[31] *Graf Vitzhum* (note 20), 87 (footnote 97).

[32] *Ibid.*, 95 (MN 63–64); see also Arts. 149, 303 UNCLOS.

[33] *Vladimir D. Degan*, Internal Waters, NYIL 17 (1986), 3, 12: 'Subject only to the exception of ships in distress, the coastal State is free to refuse access to these parts of its internal waters to any foreign ships, or it can accept at will the ships of friendly nations and refuse others. Because this is a matter of exercising its sovereignty, the coastal State is allowed to discriminate against flags or types of foreign ships.'

[34] *Nicaragua Case* (note 29), 111 (para. 213).

[35] *Graf Vitzhum* (note 20), 88 (MN 45); *Tanaka* (note 21), 80; see *Alan V. Lowe*, The Right of Entry into Maritime Ports in International Law, San DiegoLRev 14 (1976–1977), 597–622, for analysis of the *ARAMCO Award*, with extensive references to other authors in favor of and against a right of entry as well as elaboration on State practice; *Louise de La Fayette*, Access to Ports in International Law, IJMCL 11 (1996), 1, 22, with reference to writers arguing for a right to access *ibid.*, 13; *Rainer Lagoni*, Der Hamburger Hafen und die international Handelsschifffahrt im Völkerrecht, AVR 26 (1988), 261, 267–275, distinguishing between the closure of ports to all shipping, closure of ports to vessels of a certain flag State and closure of ports to certain vessels; *Kaare Bangert*, Internal Waters, MPEPIL, paras. 19–24, available at: http://www.mpepil.com; *Churchill/Lowe* (note 21), 62; Institut de Droit International Resolution, The Distinction Between the Régime of the Territorial Sea and the Régime of Internal Waters, 24 September 1957, Session of Amsterdam (1957), para. II: 'Subject to the rights of passage sanctioned either by usage or by treaty, a coastal State may deny access to its internal waters to foreign vessels except where they are in distress.' (English translation: http://www.idi-iil.org/idiE/navig_chon1953.html/French original: AnnIDI 47-II (1957), 473 *et seq.*) Arguing for a right to entry into ports: *C. John Colombos*, The International Law of the Sea (6th edn. 1967), 167; *Erwin Beckert/Gerhard Breuer*, Öffentliches Seerecht (1991), MN 364.

[36] *Saudi Arabia v. Arabian American Oil Company (ARAMCO)*, Award of 23 August 1958, ILR 27 (1963) 117, 212: 'According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require'.

[37] See *supra*, note 35, in particular: *Lowe* (note 35); *Tanaka* (note 21), 81.

[38] *Churchill/Lowe* (note 21), 62, with reference to State practice; *Lagoni* (note 35), 268; *Lowe* (note 35), 612, citing: Bulgarian Decree of 10 October 1951 (UN, Laws and Regulations on the Regime of the Territorial Sea,